No. 03-1716

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE LURIE COMPANY (221 N. LASALLE, CHICAGO, ILLINOIS),
Petitioner,

v.

COOK COUNTY BOARD OF REVIEW,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether jurisdiction lies under 28 U.S.C.A. 1257(a), where the petitioner's "federal questions" were neither passed upon nor presented in the state court.

2. Assuming *arguendo* that the issues now raised by the petitioner were passed upon or presented to the highest state court, whether jurisdiction lies under 28 U.S.C.A. 1257(a), where the state court decision fails to present a federal question.

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On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Cook County Board of Review ("Board of Review"), respectfully requests that this Court deny the petition for writ of *certiorari* seeking review of the decision of the Illinois Appellate Court ("Appellate Court") in this case. The opinion of the Appellate Court (App. 51-61[1]) is reported at 345 Ill. App. 3d 539, 803 N.E.2d 55 (1st Dist. 2003).

[1] Citations to the petition for *certiorari* will be in the form of "Pet. __"; citations to the appendix to the petition will be in the form of "App. __."

STATEMENT OF THE CASE

Initially, the Board of Review notes that the instant petition contains materials in the appendix that were not a part of the record in the state court proceedings below. *See* App. 109-50. These materials are inappropriately included in the appendix, and the respondent respectfully suggests that they should have no bearing on the Court's consideration of the petition.

A. Summary Of Procedural History And Decision

The instant petition relates to a state court administrative review[2] of a state agency's decision involving a local real estate tax matter. The instant petitioner, The Lurie Company ("Lurie"), originally filed a tax appeal with the Board of Review[3] contesting only the market value of its property tax assessments for 1997 and 1998. *Cook County Bd. of Review v. Property Tax Appeal Bd. (The Lurie Co., taxpayer)*, 345 Ill. App. 3d 539, 541, 803 N.E.2d 55, 57 (1st Dist. 2003), *appeal denied* 2004 Ill. LEXIS 374-75 (Ill. March 26, 2004, Docket Nos. 97708, 97717); App. 53. After the Board of Review denied its appeal, Lurie filed an appeal with the Illinois Property Tax Appeal Board ("PTAB"),[4] again, contesting only market value. *Id.* The PTAB granted relief based upon Lurie's market value claim, as well as upon an issue under the Illinois Constitution[5] that Lurie belatedly presented to the

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[2] *See* Illinois Administrative Review Law, 735 ILL. COMP. STAT. ANN. 5/3-101 *et seq.* (West 2002).

[3] *See* 35 ILL. COMP. STAT. ANN. 200/16-5 through 16-15, and 16-95, *et seq.* (West 2002).

[4] *See* 35 ILL. COMP. STAT. ANN. 200/16-160, *et seq.* (West 2002).

[5] The PTAB granted additional relief based upon its interpretation of the "2 ½ to 1" limitation of the Illinois Constitution of 1970, Article IX, Section 4(b). *Lurie*, 345 Ill. App. 3d 539, 540-41, 803 N.E.2d 55, 57; App. 52-53. For counties in Illinois that classify real property for purposes of taxation, the "2 ½ to 1" limitation of Article IX, Section 4(b) of the Illinois Constitution prohibits the assessment level of the highest

PTAB as rebuttal after the Board of Review had filed its responsive pleadings and evidence. *Id.* at 541-43, 57-59; App. 54-56. The Board of Review sought judicial review of the PTAB's decision before the Appellate Court[6] contesting the PTAB's determination of the state constitutional issue.

The Appellate Court reversed the PTAB's decision on the state constitutional issue, holding that the PTAB lacked the authority to expand the scope of Lurie's tax appeal to include a state constitutional issue that was not raised at the Board of Review or timely presented in the filings before the PTAB. *Id.* at 545, 60; App. 58. This holding expressly followed an earlier decision by the Appellate Court in *Cook County Bd. of Review v. Property Tax Appeal Bd. (The Bosch Corp., taxpayer, et al.)*, 339 Ill. App. 3d 529, 791 N.E.2d 8 (1st Dist. 2003), *appeal denied* 205 Ill. 2d 578, 803 N.E.2d 480 (Ill. Oct. 7, 2003, Docket Nos. 96760, 96775).[7] *Id.* at 541-42, 57-58; App. 53. No rehearing petition was filed before the Appellate Court. Both the PTAB and Lurie filed petitions for leave to appeal ("PLA") in the Illinois Supreme Court.[8] App. 165-246. The Illinois Supreme Court denied both the PTAB's and Lurie's PLA. *Lurie*, 2004 Ill. LEXIS 374-75 (Ill. March 26, 2004, Docket Nos. 97708, 97717); App. 62.

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classification from exceeding 2 ½ times the level applied to the lowest classification. *Id.*

[6] Because Lurie requested more than $300,000 in assessed value reduction in its petition filed with the PTAB, direct administrative review in the Appellate Court was required. *See* 35 ILL. COMP. STAT. ANN. 200/16-195 (West 2002).

[7] In *Bosch*, the Appellate Court held, in relevant part, that the PTAB was precluded from granting relief on a constitutional claim by a taxpayer that was not timely raised before the Board of Review or the PTAB. *Bosch*, 339 Ill. App. 3d 529, 534-35, 791 N.E.2d 8, 13.

[8] Whether the Illinois Supreme Court grants such a PLA "is a matter of sound judicial discretion." Ill. S. Ct. Rule 315(a).

B. Relevant State Procedural Law and *Bosch*

Illinois courts have consistently held that, in cases arising under the Administrative Review Law (735 ILL. COMP. STAT. ANN. 5/3-101 *et seq.* (West 2002)), a claimant must assert any constitutional challenge at the earliest administrative level in order to preserve the issue for judicial review. *See Continental Paper Grading Co. v. Fisher*, 1 Ill. 2d 37, 45, 115 N.E.2d 291, 295 (1953); *see also Head-on Collision Line, Inc. v. Kirk*, 36 Ill. App. 3d 263, 268-69, 343 N.E.2d 534, 538-39 (1st Dist. 1976). Moreover, under Illinois law, issues not placed before administrative agencies are deemed waived. *Texaco-Cities Service Pipeline Company v. McGaw*, 182 Ill. 2d 262, 278-79, 695 N.E.2d 481, 489 (1998).

In the context of a real estate tax appeal, Illinois courts have consistently held that the burden to raise and prove a state constitutional tax claim rests squarely upon the taxpayer, and that the burden must be carried by clear and convincing evidence. *In re Application of Rosewell (U.S. Steel, taxpayer)*, 106 Ill. 2d 311, 324-25, 478 N.E.2d 343, 349-50 (1985); *Walsh v. Property Tax Appeal Bd.*, 181 Ill. 2d 228, 234, 692 N.E.2d 260, 262 (1998). For tax appeals filed with the PTAB, by statute, a taxpayer is required to file a petition with the PTAB "setting forth the facts upon which he or she bases the objection, together with a statement of the contentions of law which he or she desires to raise, and the relief requested." 35 ILL. COMP. STAT. ANN. 200/16-160 (West 2002).

Consistent with Illinois law, the PTAB's Rules require that in a petition for appeal a taxpayer "state the facts upon which the contesting party bases his objection to the decision of the board of review, together with a statement of the contentions of law which he desires to raise." 86 Ill. Admin. Code 1910.30 (h) (Conway Greene CD-ROM 2002); App. 74. Moreover, "if contentions of law are raised, the contesting party shall submit a brief in support of his position with the

petition." *Id.* Failure to comply with these requirements "shall result in dismissal of the appeal." *Id.* The PTAB rules further emphasize that "all information required to fully complete the petition shall be furnished by the contesting party at the time the petition is filed." 86 Ill. Admin. Code 1910.30(k) (Conway Greene CD-ROM 2002); App. 75.

When called to interpret the PTAB's statutory and regulatory scheme, Illinois courts have held that a taxpayer's claims are fixed at the time it files its petition with the PTAB. *See Co. of Coles v. Property Tax Appeal Board*, 275 Ill. App. 3d 945, 948-49, 657 N.E.2d 673, 676 (4th Dist. 1995); *Comm. High School District v. PTAB*, 288 Ill. App. 3d 386, 388, 682 N.E.2d 235, 237 (2nd Dist. 1997). Based upon the legal framework outlined above, and in a context identical to the instant case, the Illinois Appellate Court held that the PTAB could not consider state constitutional claims not originally raised by the taxpayer in either its appeal to the Board of Review or the PTAB. *Bosch*, 339 Ill. App. 3d 529, 539; 791 N.E.2d 8, 17. In apparent agreement, subsequent to the *Bosch* decision the Illinois General Assembly amended the Illinois Property Tax Code[9] to clarify that a taxpayer's appeal is "limited to the grounds listed in the petition filed with the [PTAB]." 35 ILL. COMP. STAT. ANN. 200/16-180, *as amended*, P.A. 93-0248 (West Supp. 2004). In the instant case, the Appellate Court expressly relied upon the *Bosch* case, finding the facts to be "procedurally similar." *Lurie*, 345 Ill. App. 3d at 543, 803 N.E.2d at 59; App. 56.[10]

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[9] *See* 35 ILL. COMP. STAT. ANN. 200/1-1, *et seq.*

[10] The *Bosch* case had originally been decided, pending petitions for rehearing, during the briefing of the instant case before the Appellate Court. The original opinion was reported at 2002 Ill. App. LEXIS 730 (Ill. App. Ct., Aug. 20, 2002). The petitions for rehearing in *Bosch* were denied by the Appellate Court, and the Court's original opinion was only modified to include some additional unpublished material. *See Bosch*, 339 Ill. App. 3d 529, 791 N.E.2d 8.

REASONS FOR DENYING THE WRIT

Lurie argues that this Court should grant *certiorari* based on the contention that the Illinois Supreme Court's and the Appellate Court's refusal to consider the merits of its state constitutional claim violated Lurie's due process rights because such refusal constituted a substantive change in Illinois law that retroactively deprived Lurie of its property rights. As will be explained herein, the due process arguments advanced in the instant petition were not raised in the state court below, and, thus, were not passed upon by the state court. Moreover, the Appellate Court's decision does not present a substantial federal question. Accordingly, this Court should deny the petition.

I. JURISDICTION DOES NOT LIE UNDER 28 U.S.C.A. 1257(a), AS LURIE'S "FEDERAL QUESTIONS" WERE NEITHER PASSED UPON NOR PRESENTED IN THE STATE COURT.

Neither the Illinois Appellate Court nor the Illinois Supreme Court passed upon the issues now raised by Lurie. In its petition, Lurie argues for the first time that the Appellate Court's decision, and the Illinois Supreme Court's denial of Lurie's PLA, violated the federal due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution by substantively changing Illinois law and retroactively applying this change to Lurie. Regardless of whether its arguments are well founded, Lurie failed to present these issues at the state court level.

Where the state court decision is silent on the federal question presented by a petition for *certiorari*, the Court will assume that the issue was not properly presented. *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1983)). Accordingly, Lurie bears the high burden of showing that a federal question was in fact properly raised,

such that the state court had a fair opportunity to address it. *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Adams*, 520 U.S. 83, 86. In carrying this burden, Lurie must demonstrate that the federal issue was raised "'at the time and in the manner required by the state law,'" (citations) and that it "presented the particular claim at issue here with 'fair precision and in due time,'" (citations). *Adams*, 520 U.S. at 87.

Moreover, U.S. Supreme Court Rule 14.1(g)(i) requires that a *certiorari* petition specify the stage in proceedings when the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way in which they were passed on by the state courts, with specific reference to portions of the record where the matter appears. In a perfunctory attempt to comply with these requirements, Lurie asserts that "Due process questions were first raised by Petitioner in the Response Brief of Respondent, The Lurie Company, before the Appellate Court and, again, in the Petition for Leave to Appeal of the Lurie Company before the Illinois Supreme Court." Pet. 6. However, neither Lurie's Response Brief filed in the Appellate Court nor the PLA filed in the Illinois Supreme Court raised the particular due process questions now presented to this Court.

A. Lurie Failed To Raise A Federal Question In The State Courts.

Lurie's Response Brief in the Appellate Court presented the argument that "Cook County's Tax Assessment of the Property Also Violates the Equal Protection Clause of the United States Constitution." App. 243. Lurie made no claim that a federal due process right was being infringed, let alone the particular due process right now raised before this Court. Moreover, the equal protection argument presented to the Appellate Court related specifically to Lurie's claim that the contested tax assessment operated to discriminate against it in violation of the federal equal protection clause. This

argument is quite distinct from the claim now advanced by Lurie, that the Appellate Court's decision, rather than the contested tax assessment, operated to apply a new rule of law retroactively against Lurie in violation of the federal due process clauses. This new argument was never before the Appellate Court.

Lurie's PLA to the Illinois Supreme Court also failed to raise the particular claims now being advanced. In its PLA, Lurie vaguely invoked the "due process guaranteed by the Illinois and United States Constitution." App. 170-71. However, Lurie addressed completely different constitutional concerns than those now presented. As discussed further below, in its PLA Lurie generally referred to a "taxpayers. . . right to due process and equal protection" in scattered contexts. *See* App. 174-85. Moreover, Lurie failed to support its limited arguments on this subject with any cases involving the United States Constitution. *Id.*

In its PLA, Lurie first presented the argument that "The [Appellate Court's] erroneous ruling. . . deprives taxpayers of their constitutional right to due process and equal protection." App. 174. Yet, in making this argument, Lurie based its claims on its assertions that:1) the Appellate Court's decision would require the PTAB to cease conducting *de novo* hearings; and 2) the Appellate Court's decision would require extensive hearings before the Board of Review that would neither be practically available nor legally permissible. App. 174-80. Lurie concluded that the Illinois Supreme Court "should grant review to make clear that boards of review are not bodies of record, and that limiting the PTAB to addressing only issues raised at the board ofreview [sic] is contrary to law, wholly impractical and most importantly will result in no available remedy for taxpayer's [sic] whose constitutional rights to due process and equal protection *have been* violated." App. 179-80 (emphasis supplied).

In the PLA, Lurie also briefly invoked the "Illinois and United States Constitutions" in arguing that the Appellate Court's ruling was inconsistent with existing Illinois state law. App. 185. However, in making this argument, Lurie based its constitutional claims on its asserted "right to a fair and equitable *assessment*," rather than the due process rights now asserted. *Id.* (emphasis supplied). Lurie did not argue therein that the Appellate Court's *decision* operated to retroactively deprive it of any property rights. App. 182-85. Moreover, Lurie made no reference to due process in this argument. *Id.*

A fair reading of Lurie's PLA reveals a lack of clarity as to the particular constitutional claims presented. Certainly, Lurie's broad attempts to invoke the equal protection and the due process clauses of the Illinois and United States constitutions in its PLA did not articulate the particular federal due process claims now advanced in the instant petition. Rather, in its PLA, Lurie asserted a generalized constitutional argument that is significantly different in substance from the "federal question" urged in its petition.

The relevant arguments advanced in the PLA were limited to: 1) Lurie's perception that the Appellate Court's decision mandated a procedural framework wherein taxpayers would not be afforded due process and equal protection of the laws when they proceed before the Board of Review or the PTAB; and 2) a generalized claim that the Appellate Court's decision somehow perpetuated an inequitable tax assessment that violated the equal protection and due process clauses of the state and federal constitutions. In its PLA, Lurie never raised the claim now presented to this Court, namely, that the Appellate Court's decision retroactively applied new law to Lurie's property in violation of the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution. Accordingly, Lurie has not demonstrated that it

"presented the particular claim at issue here with fair precision and in due time." *See Adams*, 520 U.S. at 87.

B. Lurie Cannot Raise A Federal Issue For The First Time In This Court.

In presenting its newly asserted argument in the instant petition, Lurie attempts to avail itself of an exception to the general rule that a federal question may not be raised for the first time in a petition for *certiorari*. *See Saunders v. Shaw*, 244 U.S. 317, 320 (1917). This limited exception is appropriately invoked in that rare situation where the highest state court, following a "surprise" decision wherein the federal issue is born, declines to entertain a petition for rehearing and the federal question can be raised in no other way than through a petition for *certiorari*. *Id.* To this end, Lurie relies upon *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n. 3 (1996), and *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930). Lurie's reliance upon this exception is misplaced.

To begin, Lurie never filed a petition for rehearing either in the Appellate Court or the Illinois Supreme Court. In the cases cited by Lurie where this Court has recognized the "surprise decision" exception, the aggrieved party had made some effort, such as filing a rehearing petition, to bring the new federal claim to the attention of the state court. *See Richards*, 517 U.S. 793, 797 n. 3; *Brinkerhoff-Faris*, 281 U.S. 673, 677-78. No legitimate effort in this regard was made in the instant case. Lurie failed to file a petition for rehearing with the Appellate Court once that court issued the decision Lurie now claims created the federal issue. Moreover, as discussed above, in its PLA Lurie did not raise the particular federal issue asserted here. Finally, assuming *arguendo* that

the Appellate Court's decision represented any change in Illinois law,[11] this ruling represented no surprise to Lurie.

Lurie must show that the decision of the state court was a surprise and could not have been reasonably anticipated from prior decisions. *Herndon v. Georgia*, 295 U.S. 441 (1935). Lurie acknowledges in its petition that the "Appellate Court followed its own months old decision in *Cook County Bd. of Review v. Property Tax Appeal Bd.*, 792 N.E.2d 8 (Ill. App. Ct. 2002) (sometimes referred to as "*Bosch*") in reaching its decision in the instant case."[12] Pet. 8 n. 3. The "surprise" change in the law now complained of by Lurie was, in fact, existing law predating the decision of the Appellate Court in this case by more than a year. Lurie cannot plead ignorance of the ruling in the *Bosch* case, and was therefore bound to anticipate the probability of a similar ruling in its own case.[13] *See Herndon*, 295 U.S. 441, 446. As noted above, under the procedural facts of this case, *Richards*, 517 U.S. 793, and *Brinkerhoff-Faris*, 281 U.S. 673, are readily distinguishable.

A careful review of the instant petition reveals a garden variety state law procedural case. Where a state court does not consider a constitutional attack because it was not properly raised, this Court will decline jurisdiction. *See Beck v. Washington*, 369 U.S. 541, 550 (1962). And where the highest state court is completely silent on the federal question, this Court must assume that the silence is due to

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[11] The Board of Review sharply contests this claim and addresses the relevant Illinois law in its Statement Of The Case, section B *supra*, and in its argument herein at section II *infra*.

[12] In its PLA filed in the Illinois Supreme Court, Lurie noted that the Appellate Court had made the identical legal ruling as that complained of in the instant case over one year before the filing of the PLA. (App. 177).

[13] During the briefing of the instant case before the Appellate Court, the PTAB, as appellee, anticipated that the *Bosch* case might be applied in the instant case, filing a Supplemental Brief with the Appellate Court discussing the impact of the *Bosch* decision.

the petitioner's failure to comply with the state's procedural requirements. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945).

In the instant case, the state courts' silence as to the "federal question" raised in the instant petition, may be attributed solely to Lurie's utter failure to present this question at the state court level. Moreover, the Appellate Court's decision itself was based upon Lurie's failure to properly raise a state constitutional tax claim as required under Illinois law. *Lurie*, 345 Ill. App. 3d at 541-45, 803 N.E.2d at 57-60; App. 53-58. Lurie now claims that the Appellate Court's decision to follow established Illinois law on this state procedural question created the federal issue. But Lurie's claim must fail at this late juncture. The Appellate Court's decision turned upon Lurie's consistent failure to raise and support its constitutional claims in a timely manner. At every level of the state proceedings, administrative and judicial, Lurie has habitually interposed untimely, purported constitutional issues, seemingly as an afterthought. Where reasonable state procedures are not observed in claiming a constitutional violation, this Court will decline to exercise jurisdiction. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903). Accordingly, in the instant case, this Court should decline jurisdiction.

II. ASSUMING *ARGUENDO* THAT THE ISSUES NOW RAISED BY LURIE WERE PASSED UPON OR PRESENTED TO THE HIGHEST STATE COURT, JURISDICTION DOES NOT LIE UNDER 28 U.S.C.A. 1257(a), AS THE STATE COURT DECISION FAILS TO PRESENT A FEDERAL QUESTION.

A. Jurisdiction Does Not Lie As The State Court Decision Involves Only Questions Of State Law.

Jurisdiction in the United States Supreme Court does not attach where the judgment of the state court rests on "independent and adequate" state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Where a state court decides a matter pursuant to state law independent of any federal question, the case is not reviewed by the Supreme Court of the United States unless the non-federal ground is so unfounded as to be considered arbitrary. *McCoy v. Shaw*, 277 U.S. 302, 303 (1928). The power of the U.S. Supreme Court over state court judgments is limited to its authority to correct a matter to the extent the state court incorrectly adjudges federal rights. *Pitcairn*, 324 U.S. 117, 126. In determining whether an independent and adequate state ground exists, the Supreme Court will consider whether the state ground is free of entanglement with a federal question, and whether the ground is adequate to sustain the state court's judgment without more. *Black v. Cutter Laboratories*, 351 U.S. 292, 298 (1956).

In the present case, the Appellate Court concluded that, under Illinois law, Lurie's state constitutional tax claims could not be addressed where Lurie failed to timely raise such claims at the Board of Review and PTAB. *Lurie*, 345 Ill. App. 3d at 545, 803 N.E.2d at 60; App. 58. The Appellate Court decided this case on a procedural point of Illinois law that it found to be controlled by its earlier decision in *Bosch*

(339 Ill. App. 3d at 539, 791 N.E.2d at 17). *Lurie*, 345 Ill. App. 3d at 541-42, 803 N.E.2d at 57-58; App. 53. The Appellate Court's decision rested exclusively upon its interpretation of Illinois law. State courts are the "ultimate expositors of state law" and this Honorable Court is bound by their construction absent extreme circumstances. *Mullaney v. Wilbur*, 421 U.S. 684, 689 (1975).

B. The State Court Correctly Applied Illinois Law On Procedural Questions, And Its Decision Does Not Raise Federal Due Process Issues.

The Illinois Appellate Court correctly held that the scope of PTAB's review could not be enlarged to include a state constitutional tax claim where Lurie failed to properly present such a challenge in its property tax appeal filings. *Lurie*, 345 Ill. App. 3d at 545, 803 N.E.2d at 60; App. 58. This holding followed existing precedent, as previously outlined in the Board of Review's Statement Of The Case, *supra*. *See Continental Paper*, 1 Ill. 2d 37, 45, 115 N.E.2d 291, 295; *Head-on Collision Line*, 36 Ill. App. 3d 263, 268-69, 343 N.E.2d 534, 538-39; *Texaco-Cities*, 182 Ill. 2d 262, 278-79, 695 N.E.2d 481, 489; *U.S. Steel*, 106 Ill. 2d 311, 324, 478 N.E.2d 343, 349; *Walsh*, 181 Ill. 2d 228, 234, 692 N.E.2d 260, 262; *Co. of Coles*, 275 Ill. App. 3d 945, 948-49, 657 N.E.2d 673, 676; *Comm. High School District*, 288 Ill. App. 3d 386, 388, 682 N.E.2d 235, 237-38; *see also Bosch*, 339 Ill. App. 3d at 539, 791 N.E.2d at 17.

Lurie elected only to challenge the market value of its real estate tax assessment before the Board of Review, and thereafter appealed to the PTAB challenging only market value. *Lurie*, 345 Ill. App. 3d at 541-42, 803 N.E.2d at 57-58; App. 53. Lurie failed to raise its state constitutional tax claim and also failed to timely submit any evidence that would support such a constitutional claim. *Id.* at 541-45, 57-60; App. 53, 55-58. Based upon these procedural facts, the Appellate Court correctly concluded that under Illinois law

the PTAB was limited to a consideration of market value only. *Id.*; *see also Bosch*, 339 Ill. App. 3d at 539, 791 N.E.2d at 17. Where the PTAB sought to address a state constitutional tax claim that was not properly developed by the taxpayer, either at the Board of Review or at the PTAB, the Appellate Court correctly applied existing Illinois law in its determination that it would not consider such constitutional claims on administrative review. *Id.*

Illinois courts have long held that reviewing courts must be especially wary of treading upon constitutional issues not raised before the administrative agencies below, as complaining parties have "the obligation of raising constitutional questions at the earliest opportunity." *Head-on Collision*, 36 Ill. App. 3d at 268-69, 343 N.E.2d at 538; *see also Texaco-Cities*, 182 Ill. 2d at 278-79, 695 N.E.2d at 489. The burden to raise and prove a state constitutional tax claim has always rested on the taxpayer. *Bosch*, 339 Ill. App. 3d at 539, 791 N.E.2d at 17 (citing *U.S. Steel*, 106 Ill. 2d 311, 478 N.E.2d 343); *see also Walsh*, 181 Ill. 2d at 234, 692 N.E.2d at 262. Lurie did not preserve its state constitutional claim for judicial review in the Appellate Court. *Lurie*, 345 Ill. App. 3d at 541-45, 803 N.E.2d at 57-60; App. 53, 55-58. As noted above, the law on this procedural point is well settled in Illinois. A state may attach reasonable time limitations to the assertion of constitutional claims. *Michel v. Louisiana*, 350 U.S. 91, 97 (1955). Illinois law on this procedural issue represents a reasonable state procedural limitation. *Id.* Thus, in as much as the Illinois Appellate Court followed established Illinois law on this state procedural issue, Lurie fails to present a federal question for this Court to consider. *See Beck*, 369 U.S. 541, 550.

Lurie relies upon several cases in support of its federal due process arguments: *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Richards*, 517 U.S. 793; *Brinkerhoff-Faris*, 281 U.S. 673; and *Sioux City Bridge Co. v. Dakota County, Neb.*,

260 U.S. 441 (1923); Pet. 12-18. Lurie's reliance on these cases is misplaced, as they are readily distinguished from the instant case. The common thread in each of these cases is that the state action complained of, through no omission of the complaining party, operated to completely deny the complainant any opportunity to be heard on its underlying claim. That type of deprivation is profoundly different from that suggested in the instant case, where the Appellate Court's reasoned declination of Lurie's state constitutional tax claim was based upon Lurie's failures to comply with the existing procedural requirements under Illinois law.

In the instant case, Lurie has at all times had an available remedy to address its state constitutional tax claims, or for that matter any tax claims, by way of either an administrative proceeding before the PTAB with administrative judicial review, or judicial proceeding in the first instance in state court.[14] It was Lurie's total disregard for existing state procedural requirements, and nothing else, that caused the Illinois courts to decline consideration of its state constitutional claim. Unlike the Missouri Supreme Court in *Brinkerhoff*, *supra*, the Illinois Appellate Court did not overrule established precedent depriving the taxpayer of any forum within which to assert his claims. Instead, the Appellate Court adhered to Illinois precedent, requiring parties to present constitutional claims at the earliest moment and to timely raise such issues in property assessment appeals at PTAB. *See Continental Paper*, 1 Ill. 2d at 45, 115 N.E.2d at 295; *Head-on Collision*, 36 Ill. App. 3d at 268-69, 343 N.E.2d at 538; *see also Bosch*, 339 Ill. App. 3d at 539, 791

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[14] Under Illinois law, a taxpayer has two alternative, mutually exclusive, statutory remedies to challenge its real estate assessment: 1) filing an appeal before the PTAB, which is heard *de novo* (*See* 35 ILL. COMP. STAT. ANN. 200/16-160 *et seq.* (West 2002)); or 2) filing a complaint in state court, which is also heard *de novo* (*See* 35 ILL. COMP. STAT. ANN. 200/23-5 *et seq.* (West 2002)).

N.E.2d at 17. Such a ruling by the Illinois courts does not raise any due process issues.

The Appellate Court issued its decision pursuant to established state precedent and rules of administrative procedure. Because the Appellate Court's determination rested on a solid and independent state foundation, its decision cannot be considered so arbitrary as to warrant review by this Honorable Cour *See McCoy*, 277 U.S. 302, 303, (citing *Leathe v. Thom*, 207 U.S. 93, 99 (1907)); *Vandalia Railroad v. South Bend*, 207 U.S. 359, 367 (1907). Accordingly, this Court should decline jurisdiction. *See Pitcairn*, 324 U.S. at 126.

C. Assuming *Arguendo* A Federal Question Is Raised By The Appellate Court's Decision That Lurie Waived Its State Constitutional Claim By Not Raising It At The Board Of Review, Lurie's Additional Failure To Properly Raise Its Claim Before The PTAB Provided An Independent And Adequate State Ground On Which The Appellate Court Ruled.

The Appellate Court concluded that Lurie's state constitutional tax claims could not be addressed where the taxpayer failed to timely raise such claims before the Board of Review *and* before the PTAB. *Lurie*, 345 Ill. App. 3d at 545, 803 N.E.2d at 60; App. 58. As earlier outlined in the Board of Review's Statement Of The Case, *supra*, under established Illinois precedent and the PTAB's Rules, a taxpayer's claims are required to be presented to PTAB at the time the petition is filed. *Bosch*, 339 Ill. App. 3d at 540, 791 N.E.2d at 18; *Co. of Coles*, 275 Ill. App. 3d at 948-49, 657 N.E.2d at 676; *Comm. High School*, 288 Ill. App. 3d at 388, 682 N.E.2d at 237-38; 86 Ill. Admin. Code 1910.30(h) & (k) (Conway Greene CD-ROM 2002); App. 74-75.

Moreover, according to PTAB's own Rules, parties are precluded from raising-new claims on rebuttal. 86 Ill. Admin. Code 1910.66 (b) (Conway Greene CD-ROM 2002); App. 88. "Rebuttal evidence shall not consist of new evidence . . . A party to the appeal shall be precluded from submitting its own case in chief in the guise of rebuttal evidence." *Id.* In the present case, Lurie attempted to present state constitutional claims, pursuant to Art. IX section 4(b) of the Illinois Constitution on rebuttal at PTAB. In so doing, Lurie failed to comply with existing state procedures and precedent. *See Bosch*, 339 Ill. App. 3d at 538-40, 791 N.E. 2d at 16-18. Lurie's failure to follow the PTAB's Rules and existing Illinois precedent in properly presenting its state constitutional tax claim provided an independent and adequate basis for the Appellate Court's decision.

Assuming *arguendo* that the Appellate Court established an unprecedented requirement that a taxpayer raise constitutional challenges concerning its property assessments at the Board of Review, Lurie still cannot get beyond its failure to properly raise its state constitutional claim before the PTAB. Existing law required taxpayers, at a minimum, to present all claims concerning their property assessment at the time of filing petitions with the PTAB. *Id.*; *Co. of Coles*, 275 Ill. App. 3d at 948-49, 657 N.E. 2d at 676; *Comm. High School District*, 288 Ill. App. 3d at 388, 682 N.E.2d at 237; 86 Ill. Admin. Code 1910.30(h) & (k), 1910.66 (b) (Conway Greene CD-ROM 2002); App. 74-75, 88. Lurie failed to preserve any constitutional issues arising in the instant matter by not complying with this requirement. Because the Appellate Court decided this matter pursuant to procedural defects not only in the Board of Review appeal, but also in Lurie's subsequent PTAB appeal, there is no need for this Court to address the issues now presented by Lurie. The Appellate Court decided the underlying matter pursuant to existing state law, and thus there are independent and

adequate state law grounds sufficient to sustain the judgment. *Id.*

Established precedent dictates that this Honorable Court not engage in the determination of constitutional issues unnecessary to the outcome of a controversy before it. *United States v. Raines et al.*, 362 U.S. 17, 20-21 (1960); *U.S. v. Zayd Hassan, et al.*, 257 F. Supp. 2d 191, 196 (D.C. 2003). Were the Court to address a federal question where state law dictates the same result, it would effectively render an advisory opinion. *Pitcairn*, 324 U.S. at 126; *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Such action is contrary to law and beyond the authority vested in the federal judiciary. *See* U.S. CONST. Art. III, *see also Pitcairn*, 324 U.S. at 126; *Uhler v. Am. Fed. Of Labor- Congress of Industrial Organizations*, 468 U.S. 1310, 1311 (1984). Were this Honorable Court to grant the request for *certiorari* and address the purported federal question now urged by Lurie, it would offer only an advisory opinion. Assuming *arguendo* that this Court found that Lurie was denied due process because of a procedural change relative to preserving constitutional issues at the Board of Review, as Lurie suggests, Lurie still failed to comport with existing Illinois procedural requirements for raising and preserving constitutional claims before PTAB. *Bosch*, 339 Ill. App. 3d at 538-40, 791 N.E.2d at 16-18; *see also* 86 Ill. Admin. Code 1910.30(h) & (k), 1910.66 (b) (Conway Greene CD–ROM 2002); App. 74-75, 88. Thus, the outcome of the instant matter ultimately rests on independent state law grounds as enumerated by the Appellate Court regardless of any federal question now urged by petitioner.

CONCLUSION

For all of the foregoing reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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